

COPY

State of New Hampshire
OFFICE OF ATTORNEY GENERAL

NOTE: In connection with point 5.
see Northern New Hampshire Lumber Co.
v. Water Resources Board, 587 F.Supp. 177

June 5, 1956

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CONCORD NH

Paul E. Hourie, Esq.
Industrial Park Authority
875 Elm Street
Manchester, New Hampshire

Gentlemen:

By letter of May 29, you have inquired whether:

- A. Your Authority is subject to RSA 228; and
 - A-1. If so, how far you are thereby restricted in respect to the employment of independent engineers, attorneys, accountants and other consultants with reference to a project contemplated for necessitous competitive bidding;
- B. Whether under Laws 1955, chapter 254, your Authority may employ legal counsel "outside of the Attorney General's office for special legal work such as clearing titles, or special counsel for specific legal problems arising out of interpretation of contracts, statutes, and legal procedures;
- C. Whether Laws 1955, chapter 254, section 6 (4), authorizing your Authority to "develop, construct facilities, maintain and operate an industrial park or parks;" includes the right to proceed with construction without resort to the Public Works Department or other state agency;
- D. If the Authority is subject to RSA 228, an aided local development corporation constructing a single building pursuant to Laws 1955, chapter 254, section 7, is also subject to RSA 228, in such construction?
- E. To what extent the directors of the Authority are personally liable.

Paul E. Nourie, Esq. -- 2.

A. In my opinion your Authority, which by express terms of its enabling statute (L. 1955, c. 254, s. 3) is described as "an agency of the state" falls within RSA 228:1, IV, and qualifies as a "Using Agency" which is defined to include "any . . . public corporation which is an instrumentality of a state . . . authority." As such, RSA 228:4, requires that major state projects shall be built by the contract method under competitive bidding, which in turn is under the control and authority of the Commissioner of Public Works unless otherwise authorized by Governor and Council. RSA 228:5 (III) It is further required therein that independent registered professional architects or registered professional engineers must be employed on construction of buildings whose cost exceeds \$25,000. RSA 228:4 (I)

The relationship between the Industrial Park Authority and the Commissioner of Public Works and Highways is by statute approximated as department and client. RSA 228:5 In this connection the determination of requirements, preparation of estimates, advertisement and reception of bids, and awarding of contracts is subject to the approval of the Governor and Council with the advice and assistance of the Attorney General. The Department of Public Works and Highways is required to itself undertake and complete all construction in excess of \$1000 for any individual project except as otherwise authorized by the Governor and Council, RSA 228:5 (III), and to furnish advice to your Authority concerning plans, designs, and other technical questions in the construction (and structural maintenance) of such facilities as your Authority deems necessary and suitable to the accomplishment of the purposes of Laws 1955, chapter 254. Also compare RSA 228:5 (II).

Cf. St. Louis Paper Co. v. N.H. Water Resources Bd.,
92 N.H. 164 (1972)

A-1. Your Authority by Laws 1955, chapter 254, may employ "such assistants, agents and consultants as it shall deem necessary or desirable for its purposes." In my opinion this extends to all personnel except those otherwise limited by the specific provisions of RSA 228. It perhaps should be observed at this point, however, that the employment of attorneys by your Authority must be confined to special projects and not for their opinion on questions of law relating to the performance of the duties of the Authority itself, which questions by provision of RSA 7:8,13, remain the responsibility of this office.

B. In my opinion you are authorized to employ legal counsel within your powers under Laws 1955, chapter 254, section 6, provided that under the general provisions of law any questions of law relating to the perform-

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Paul E. Hourie, Esq. — 3.

ance of the duties of the Authority are solely for the office of Attorney General. In the event that additional personnel should become necessary beyond the present capacity of this office in the furnishing of services to your Authority other than for specific title searches or similar specific special questions, the provisions of RSA 7:12 offer relief.

C. In my opinion, while you have authority to develop and construct facilities and maintain and operate in industrial park or parks, insofar as required construction exceeds \$1000 for any individual project, you are subject to the provisions of RSA 228. For this reason, in my opinion you are not authorized under Laws 1955, chapter 254, to proceed with respect to such so-defined major projects on your own initiative without resort to competitive bidding and without use of the Commissioner of Public Works.

D. In my opinion, Laws 1955, chapter 254, section 7, authorizes your Authority to loan money according to the terms thereof to a local development corporation which may construct a suitable industrial building thereon as determined by your Authority without the requirement that such construction be effected through the Department of Public Works and Highways. Section 7 clearly contemplates construction of such a building by an independent, privately owned local development corporation, association or foundation upon appropriate security for the repayment of monies to be loaned to it by your Authority in accordance with the terms of section 7. No requirement is contained therein that such a private corporation use the services of the Department of Public Works and Highways for the construction of such single, suitable industrial building.

E. Directors of the New Hampshire Industrial Park Authority, acting within their powers and duties as prescribed by Laws 1955, chapter 254, are not liable as insurers. Nor are they liable with respect to any reasonable act performed within the scope of their authority and in obedience to statute. It appears, however, that they might be held responsible for damages resulting from acts in excess of their authority or from acts within their authority negligently performed. I am unable to find any comprehensive judicial opinion upon the subject in New Hampshire; the foregoing comments are based upon the general exposition of the law found in 43 Am. Jur., "Public Officers" s. 272, at 292, and similar general treatises. It is believed that the better approach would be to assume a risk of personal liability for negligence. Sovereign immunity does not reach the personal activity of the Directors.

Very truly yours,

Louis C. Wyman
Attorney General

w/a